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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. NORMA NAVARRO, Defendant and Appellant.	B207071 (Los Angeles County Super. Ct. No. BA321415)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig E. Veals, Judge. Conditionally reversed and remanded.

Rita L. Swenor, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon and John R. Gorey, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Norma Navarro was convicted, following a jury trial, of one count of sale of a controlled substance in violation of Health and Safety Code section 11352, subdivision (a). She admitted that she had served six prior prison terms for felony convictions within the meaning of Penal Code section 667.5, subdivision (b) and had suffered three prior convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a). The trial court sentenced appellant to a total of nine years in state prison, consisting of the high term of four years for the current conviction, plus three consecutive one-year enhancement terms for the prior Health and Safety Code convictions, plus two consecutive one-year terms for the prior prison terms.

Appellant appeals from the judgment of conviction, contending that the trial court erred in denying her *Pitchess* motion for discovery of police personnel records. We conditionally reverse the judgment and remand this matter with directions to the trial court to conduct an in camera review of the personnel files of Officer Reyes and Detectives Armando and Feldtz, as set forth in more detail in our disposition.

Facts

On April 18, 2007, about 5:30 p.m., Officer Salvador Reyes was sitting in an unmarked police car near the intersection of Gladys and 6th Streets. He was dressed in plain clothes. The intersection was an area known for high narcotics activity. Officer Reyes observed appellant standing on the corner next to Mr. Sidney. At trial, Officer Reyes testified that he used binoculars to observe the pair.[1] Officer Reyes observed Sidney hand appellant money. Appellant took the money with her right hand and put it in her right front pants pocket. She then opened her left hand. Officer Reyes observed that

[1] Officer Reyes did not mention the binoculars in his report.

she had one or more off-white solid objects in that hand.[2] Appellant handed the object to Sidney, then walked away. Sidney sat down against a near-by building.

Officer Reyes contacted Officers Brown and Tapia, who arrested Sidney. Officers Brown and Tapia found a small white rock of cocaine in Sidney's left hand and a glass crack pipe in Sidney's right hand.

Officer Reyes also contacted Detectives Armando and Feldtz. The detectives drove into the intersection, got out of their vehicle and announced their presence. Appellant dropped a small plastic bindle on the ground from her right hand and stepped on it with her left foot. Detective Armando believed that appellant was trying to grind the cocaine into powder, so that it would blow away. The detectives recovered the bindle, which contained a white powdery residue the detectives believed was cocaine. The detectives arrested appellant.

At trial, Officer Reyes testified that the residue smelled like cocaine. The criminalist who tested the cocaine rock recovered from Mr. Sidney did not test the residue, and no test results were offered for that residue.

Other police officers recovered $112 from appellant's pocket and wallet.

Discussion

Appellant contends that the trial court erred in denying her motion for the discovery of the personnel records of Officer Reyes and Detectives Armando and Feldtz. She sought evidence of complaints against the officers of "making false, misleading or inaccurate statements orally, in writing, or in any other form" during an investigation. We agree.

A trial court's ruling on a motion for discovery of police officer personnel records is reviewed for an abuse of discretion. (*People* v. *Memro* (1995) 11 Cal.4th 786, 832.)

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[2] Officer Reyes sometimes testified that appellant had one object and other times testified that that there was more than one object.

Evidence Code section 1043 provides that the party seeking discovery of law enforcement personnel records must submit an affidavit showing "good cause" for their discovery, setting forth the materiality of the requested documents and stating "upon reasonable belief" that a governmental agency actually has them. (Evid. Code, § 1043, subd. (b)(3).) Once "good cause" is shown, the trial court examines the material sought in camera to determine its relevance to the case according to the guidelines in Evidence Code section 1045.

A showing of good cause requires a defendant to demonstrate the relevance of the requested information by providing a "specific factual scenario" which establishes a "plausible factual foundation" for the allegations of officer misconduct committed in connection with defendant. (*City of Santa Cruz* v. *Municipal Court* (1989) 49 Cal.3d 74, 85-86.) Although the factual scenario and foundation must be set forth in an affidavit or declaration, there is no requirement of personal knowledge on the part of the declarant or affiant. (*Id*. at pp. 86-89.) The threshold showing of good cause and materiality the defense must make to justify an in camera review of the records is "relatively low" or "relatively relaxed." (*Id*. at pp. 83-84.) "Counsel's affidavit must . . . describe a factual scenario supporting the claimed officer misconduct. That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report." (*Warrick* v. *Superior Court* (2005) 35 Cal.4th 1011, 1024-1025.)

The scenario must be plausible. "[A] plausible scenario of officer misconduct is one that might or could have occurred." (*Warrick* v. *Superior Court*, *supra*, 35 Cal.4th at p. 1026.) It need not be "reasonably probable or apparently credible." (*Id*. at pp. 1025-1026.) It need be "merely possible." (*Id*. at p. 1026.) "To require a criminal defendant to present a *credible* or *believable* factual account of, or a motive for, police misconduct suggests that the trial court's task in assessing a *Pitchess* motion is to weigh or assess the evidence. It is not." (*Ibid*.)

Here, appellant's trial counsel's declaration states that appellant asserts that "on the date of her arrest she went to a park to meet a friend. At the park, she entered the park restroom. Upon leaving the restroom, a stranger asked her about the local bus schedule.

While talking to the stranger, she was detained by police. The stranger was not co-arrestee Sidney, who she later saw for the first time at the police station. She did not possess a bindle containing cocaine, nor drop an object to the ground and step on it." The declaration outlines appellant's defense raising the issue of the practice of the arresting officers to make false arrests, plant evidence and falsify police reports. Appellant has alleged a plausible scenario of officer misconduct because "it is one that might or could have occurred." (*Warrick* v. *Superior Court*, *supra*, 35 Cal.4th at p. 1026.)

The trial court denied appellant's motion in its entirety. The court explained its ruling as follows: "The point is that the allegation is that everything that's in the police report is a fabrication from start to finish, they made the whole thing up. [¶] There was never any transaction, there was never any bag, there was never any stomping, and I just don't think that's plausible, and that's exactly what, umm, *Thompson* says . . . ." The court was referring to *People* v. *Thompson* (2006) 141 Cal.App.4th 1312.

The court erred in denying appellant's motion. Her counsel's declaration more than met the standards set forth in *Warrick* v. *Superior Court*, *supra*, 35 Cal.4th 1011.[3]

The court's and respondent's reliance on *People* v. *Thompson*, *supra*, is misplaced. The defendant in that case claimed that 11 police officers conspired to frame him for narcotics sales, and did not offer an alternate version of the facts regarding his presence in the place where he was arrested. (*People* v. *Thompson*, *supra*, 141 Cal.App.4th at p. 1318.) Applying a "common sense" standard, the court determined that it was not plausible that 11 officers conspired to file falsified claims against the defendant. (*Id*. at p. 1318.) Here, appellant claims that three police officers were involved in falsifying

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[3] In *Warrick*, the Court pointed to *People* v. *Hustead* (1999) 74 Cal.App.4th 410 as an example of a factual scenario in which a denial was sufficient. (*Warrick* v. *Superior Court*, *supra*, 35 Cal.4th at pp. 1024-1025.) In *Hustead*, the defense declaration simply denied that the defendant had driven in the way or along the route described by the arresting officer, and sought discovery of the officer's history of misreporting or distorting facts. (*People* v. *Hustead*, *supra*, 74 Cal.App.4th at pp. 416-417.) Appellant's declaration is more detailed than that.

evidence against her. That scenario is plausible because common sense tells us that it is one "that might or could have occurred." It is certainly possible that a small group of police officers could frame a person on the street for no apparent reason. Thus, a claim of being framed by police, for no apparent reason, can be sufficient to support a *Pitchess* motion. That was, in essence, the defendant's claim in *Warrick*. Nothing in the particulars of appellant's claim make framing impossible. Officer Reyes, who claimed to see the sale, communicated with the detectives to direct them to make the arrest. It is possible that the three could have agreed to frame appellant during that communication. There is no requirement that appellant show a motive. Further, unlike the defendant in *Thompson*, appellant did offer an alternate explanation of her activities when arrested.

Any error in denying defendant's *Pitchess* motion is subject to harmless error analysis. (See *People* v. *Memro* (1985) 38 Cal.3d 658, 684; *People* v. *Watson* (1956) 46 Cal.2d 818, 836.)

The prosecution's case consisted of the testimony of Officer Reyes and Detectives Armando and Feldtz.[4] Thus, the People's case rested on the credibility of the officers. There may not have been any relevant complaints against the officers. In that case, appellant would not have been prejudiced. If complaints of dishonesty did exist against all of the officers, and if those complaints led to admissible evidence, such evidence might have influenced the jury's assessment of the officers' credibility. Thus, we are unable to determine whether the denial of the *Pitchess* motion was harmless. In such circumstances, we remand this matter to the trial court to conduct an in camera review of the officers' files in accordance with the instructions in our disposition. (See *People* v. *Hustead*, *supra*, 74 Cal.App.4th at pp. 418-423 [setting forth limited remand procedure].)

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[4] Officer Brown also testified at trial, but that testimony concerned only co-defendant Sidney. The statement in respondent's brief that Officer Brown testified about the plastic bindle is incorrect.

Disposition

The judgment is reversed and this matter is remanded to the trial court with directions to conduct an in camera hearing on appellant's *Pitchess* motion consistent with this opinion. If the hearing reveals no discoverable information in the officers' personnel files, the trial court is ordered to reinstate the original judgment and sentence and the judgment is ordered affirmed. If there is discoverable material in any of those files, it should be turned over to appellant so that she may determine whether that material would have led to any relevant, admissible evidence that she could have presented at trial. If appellant is able to demonstrate that she was prejudiced by the earlier denial of discovery, the trial court should order a new trial. If appellant is unable to demonstrate prejudice, the trial court is ordered to reinstate the original judgment and sentence and the judgment is ordered affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.